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No. 94-859

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Bruce Babbitt, Secretary of the Interior, *et al.*,
Petitioners,

v.

Sweet Home Chapter of Communities for a Great Oregon, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia

BRIEF OF THE DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION, HILL COUNTRY HERITAGE ASSOCIATION, NATIONAL WILDERNESS INSTITUTE, TEXAS FARM CREDIT PROPERTY RIGHTS FOUNDATION, TEXAS WILDLIFE ASSOCIATION, TRANS TEXAS HERITAGE ASSOCIATION, and DEFENDERS OF PROPERTY RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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March 23, 1995

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QUESTION PRESENTED

Whether the definition of "harm" under regulations implementing the Endangered Species Act of 1973 must be construed in a manner consistent with the Fifth Amendment mandate that private property be protected?

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Pursuant to Rule 37.3 of the Rules of this Court, the *amici* submit this brief in support of the Respondents. The *amici* support affirmance of the decision below. Consent to the filing of this brief has been granted by counsel for the Respondents and counsel for the Petitioners, and has been lodged with the Clerk of this Court.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The **Davis Mountains Trans-Pecos Heritage Association** is an association of Texas citizens formed in response to the abridgment of private property rights taking place in the Davis Mountains & Trans-Pecos areas. The Association supports private property rights protection through research, public education and other activities. Its mission embraces conservation of natural resources in conjunction with respect for private property rights, which underlie all other individual liberties.

The **Hill Country Landowner's Coalition (HCLC) (Georgetown, TX)** was formed in 1991 to oppose a local endangered species preservation plan to regulate private land use and to purchase a 30,000-acre wildlife refuge with tax-payer funds. The coalition is committed to the principle that when the rights of the individual are threatened — as they are when the government is allowed to render privately-owned land useless in order to protect an endangered or threatened species without paying any compensation whatsoever to the owner of that land — the whole fabric of American society is jeopardized.

The **National Wilderness Institute (NWI), (Washington, DC)** is a national public interest group dedicated to the wise management of natural resources, unique and special wildlife habitat, and wetlands. NWI embraces the perspective that renewable resources such as air, water, soil, wildlife, fish, forest, and range are dynamic, resilient, and respond posi-

tively to wise management. NWI stresses the need for a private sector stewardship that enhances the resource base without unnecessarily inhibiting economic growth. NWI encourages environmentally sound, site- and situation-specific practices that harness the dynamic and creative forces of the private sector — including protection of private property rights — and that reduce the regulatory burden of the federal government. NWI has spent a significant amount of its resources on the study and analysis of the impact of the Endangered Species Act on private property.

The **Texas Farm Credit Property Rights Foundation (Austin, TX)** is a non-profit educational and research organization formed to further the efforts of protection of property rights through litigation and legislation. Its efforts are concentrated on promoting coordination and communication among property rights groups to find common goals and strategies to preserve the Fifth Amendment guarantees as intended by the Founding Fathers. It is dedicated to the principle that private property rights not be trampled by confiscatory government regulation.

The **Texas Wildlife Association (TWA) (San Antonio, TX)** was formed in 1985 to serve as an advocate for the benefit of wildlife and for the rights of wildlife managers, landowners, and hunters in educational, scientific, political, regulatory, legislative, and legal arenas. The Texas Wildlife Association is a non-profit organization whose membership controls (either through ownership or leasing or consulting obligations) millions of acres of wildlife habitat in Texas. TWA

members are dedicated to the maintenance, management, and enhancement of wildlife habitat on private land. Its mission is to insure that wildlife, especially on private property, remains an enduring part of Texas.

The **Trans Texas Heritage Association (TTHA) (Alpine, TX)** is a statewide organization dedicated to the protection of landowner rights. Founded in 1991, its members collectively own over 15 million acres of land in Texas and other states. Members of TTHA believe that private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and environmental regulations and government land acquisitions often unreasonably limit the spectrum of private property ownership.

Defenders of Property Rights (Washington, DC) is the nation's only legal defense foundation devoted exclusively to protecting private property rights. It was founded in 1991 in recognition that property rights are today under siege by excessive government laws and regulations that often have the effect of rendering the Constitution a worthless scrap of paper. Its mission is to protect vigorously those rights considered essential by the framers of the Constitution, and to promote a better understanding of the integral relationship between private property rights and individual rights and liberty. Defenders engages in litigation across the county affecting the public interest and the private property rights of its membership to stem government incursion forbidden by the Bill of Rights. Defenders has devoted a significant portion of its resources to the issue of regulatory takings and

participated in both the *Lucas v. South Carolina Coastal Council* , 112 S. Ct. 2886 (1992), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) cases when they were before this Court.

STATEMENT OF THE CASE

This case calls into question the interpretation by the United States Department of Interior of the "take" prohibitions under the Endangered Species Act of 1973 (ESA or Act) that apply to private property. The court below invalidated a broad regulatory definition of "take," finding that "significant habitat modification" does not constitute a prohibited "take" within the meaning of Section 9 of the ESA because a "take" must involve a "direct application of force against the animal taken." *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1465 (D.C. Cir. 1994).

SUMMARY OF ARGUMENT

The touchstone of regulatory takings analysis under the Fifth Amendment's just compensation clause is whether the regulation has "gone too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The ESA epitomizes a regulatory scheme that has, in fact, "gone too far." Enacted in an era marked by rapid growth and a shared sense that government resources were unlimited, the ESA reflects environmental zeal at its zenith. In *TVA v. Hill*, 437 U.S. 153 (1978) this Court stated that at the time the ESA became law Congress viewed conserving endangered species as the "the highest of

priorities," *Id.* at 174, and a goal to be attained "whatever the cost." *Id.* at 184. Passage of the ESA was fueled by a recognition that this nation had previously paid inadequate attention to the environment and the plight of many endangered species such as the American bald eagle and grizzly bear.

But today, at the close of the Act's second decade, complex and extensive environmental laws are in place at every level of government. Today, we not only recognize that our resources are insufficient to protect all 1,200 species, subspecies, and vertebrate populations listed as endangered or threatened under the Act, but we now have in place the most complex and comprehensive environmental regulatory scheme on the planet. As a result, virtually every conceivable aspect of private property use and ownership is governed by one or more environmental laws.

Ironically, after more than two decades of intensive enforcement of the ESA — made possible by the broadest interpretation of regulatory authority such as the agency interpretation at issue in this case — it has become clear that the ESA has failed to fulfill its promise of recovering endangered species from extinction. *See generally* Dixy Lee Ray, *Environmental Overkill* (1993). Rather, harsh and rigid regulations which take no account of economic or social needs have fostered a backlash against government by those private property owners unfortunate enough to have such species located on their land. The backlash against the ESA has fueled a property rights movement the likes of which have not been seen in this country since the 1960's when

black Americans marched on Washington in protest of the violation of their civil rights by a government that had all but forgotten its duty to uphold the constitutional rights of all of its citizens.

As a result, in large part over the public dissatisfaction with the impact of the ESA on private property rights, the House of Representatives recently passed the "Private Property Rights Protection Act of 1995" (H.R. 925). This bill requires government to compensate property owners when the value of private property has been diminished by twenty percent or more due to operation of the ESA or Section 404 of the Clean Water Act ("wetlands"). Representative Greg Laughlin (D-TX) recently explained why he supported passage of H.R. 925: "With the implementation of the Endangered Species Act and Clean Water Act provisions, property rights have been progressively eroding. . . . While many lawmakers and administrators have sat in Washington passing down these regulations to our citizens, I have been where the true effect of these regulations is felt on our farms and ranches. I have talked with the people who have lost the right to maintain their land because a government official saw fit to regulate it." *Laughlin Champions Private Property Rights with Amendments in the House*, Dripping Springs Dispatch, March 9, 1995, at 3.

Senator Mark Hatfield, one of the authors of the ESA, recently admitted that there are problems with agency implementation of the Act: "There is no question that the act is being applied in a manner far beyond what any of us envi-

sioned when we wrote it twenty years ago . . . But today that act is being applied across entire states and regions, with the result that it now affects millions upon millions of acres of publicly and privately owned land, and many thousands of human beings . . . . The situation has gotten out of control." Mark O. Hatfield, *Can't See the Forests for the Endangered Species*, Washington Post, June 12, 1992, at A23.

Despite clear congressional concern with the impact of the ESA, the agencies charged with implementing the Act continue to expand its coverage. Indeed, just last year the U.S. Fish and Wildlife Service proposed to set aside all or parts of thirty-three Texas counties — or 2.5 million acres — as critical habitat for the golden-cheeked warbler. Consuming twelve percent of the state of Texas, this designation would have constituted the largest block of land ever designated under the Act. Public outcry over the proposal, however, forced the agency to put its plan on hold.

Much of the backlash against the ESA rests upon the regulatory interpretation at issue in this case. The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

Within the definition of "take," the term "harm" has been broadly construed in regulations promulgated by the Secretary of the Interior to include "significant environmental modification or degradation" such that the activity "significantly impair[s] essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. 17.3.

This extremely broad definition of "harm" under the ESA regulations has resulted in the withdrawal of millions of acres of land from productive use across the nation without payment of any compensation to the landowners for their loss. Such regulatory taking without compensation to the landowner is a clear violation of the just compensation clause of the Fifth Amendment. The decision below, which provides a more narrowly tailored interpretation of the agency's authority to regulate and in turn, to affect private property rights, should therefore be upheld by this Court as being more consistent with the Fifth Amendment mandate that private property rights be protected.

ARGUMENT

I. THE BROAD DEFINITION OF "HARM" TO INCLUDE ANY HABITAT MODIFICATION HAS LED TO WHOLESALE DESTRUCTION OF PRIVATE PROPERTY RIGHTS.

Because of the broad regulatory definition of "harm" to include the modification of habitat as a prohibited "take" under the ESA, the use of private property can be seriously curtailed even if an actual endangered species does not, in fact, live on the regulated property. As a result, millions of acres of private property in this country are now being regulated under the guise of "protecting" endangered species and

prohibiting heretofore common uses of that property. (See map of areas of land identified as habitat of endangered species — Appendix A.) To follow are some typcial examples of how such a broad regulatory definition of "harm" can affect private property owners:

• Brandt Child planned to build a campground and golf course on his property in Three Lakes, Utah, in an area long used for recreation. The project, however, was brought to a halt when the United States Fish and Wildlife Service (U.S. FWS) declared a pond on Child's property to be prime habitat for the endangered Kanab ambersnail. U.S. FWS fenced off the pond and prohibited all recreation and work in the area, at an estimated loss of $2.5 million. Child was also made responsible for reporting any change in status on the property, so when a flock of domestic geese took up residence on the pond, he informed U.S. FWS. He was thereupon informed that if the geese ate any snails, he could face a $50,000 fine for each snail "taken."

The U.S. FWS then requested the Utah Department of Wildlife and Resources to send someone to shoot the geese to determine how many snails had been eaten. But when officials arrived and saw reporters and photographers they decided not to shoot the geese, deciding instead that because the geese were domestic animals and not wildlife, they did not have jurisdiction. Although denied by U.S. FWS, according to a newspaper reporter and local residents, U.S. FWS devised a new strategy. By inducing vomiting in the geese, the Service could get the evidence it wanted. When eventu-

ally analyzed, the vomit contained no snails. Today the geese are living elsewhere, and the snail population thrives in the pond; Mr. Child cannot develop his property, but he has never been compensated for that loss.

• Mr. and Mrs. Davidson worked for nine years in order to have enough money to obtain a down-payment for a construction loan for a home to be built on 1.45 acres near Austin, Texas. The bank told them that in order to finance the construction they would need a "bird letter" from the U.S. FWS because golden-cheeked warblers had been spotted near their land. After obtaining reports from two different biologists — at their own expense — the Davidsons established that not only were no birds present on their property, but that it was not suitable habitat for the golden-cheeked warbler. Nevertheless, the U.S. FWS disagreed and refused to give them permission to use their land unless they could meet the cost-prohibitive requirements of obtaining a Section 10(a) permit. Margaret Rector is another victim of regulatory overkill in Texas who was likewise unable to afford approval from the U.S. FWS to use her land, even though no golden-cheeked warblers were actually found there either. In 1991 her property was worth $1.3 million; after being designated critical habitat for the golden-cheeked warbler, it is now worth $29,300. No compensation has been paid to Ms. Rector or Mr. and Mrs. Davidson for the taking of their property.

• Ben Cone, a North Carolina timber land owner, always tried to harvest trees in a way that provided habitat for wild-

life. Campers, hunters and fishermen are all granted permission to use his land because he believes wildlife, tree farming and outdoor recreation are compatible. But when the endangered red-cockaded woodpecker arrived on his property, the ESA put 1,000 acres of his land off limits to him. He has already spent $8,000 on surveys by biologists to make sure he is following the stringent rules, and now estimates that he has lost $1.8 million in timber sales. To protect his remaining land from being occupied by the bird and consequently falling under federal land control, Cone had no choice but to change his timber management practices to try to harvest the pines before they become old enough to attract woodpeckers and prevent him from using the rest of his land.

• Those who live in California's 77,000-acre Stephens kangaroo rat study area found out in October of 1993 how inflexible federal enforcement of the ESA can be. As wildfires swept through California, charring 25,000 acres and destroying 29 homes, homeowners like Yshmael Garcia were warned not to clear firebreaks around their homes. "My home was destroyed by a bunch of bureaucrats in suits and so-called environmentalists who say animals are more important than people," said Garcia. " The only way to protect against fire is build a firebreak, and we weren't allowed to do that [by U.S. FWS]."

• In February 1993, the Sierra Club won a suit to force the U.S. FWS to develop a recovery plan and regulate the pumpage of water from the Edwards Aquifer. This pumpage is used by the City of San Antonio and surrounding agricul-

tural communities. An adequate flow to San Marcos Springs, one of the two primary "spill points" of the aquifer, is believed to be essential for the survival of the endangered San Marcos Salamander. The aquifer is, however, the sole water source for 1.5 million people in a five-county area. In response to the judgment by Federal Judge Lucius Bunton, the Texas State Legislature passed new laws to force severe pumping limitations for users of the aquifer. Although the law has not yet been implemented, it is estimated that costs to replace the 'lost' water could reach $7 billion over 20 years.

• When Taung Ming-Lin, a Chinese immigrant, bought land in Kern County, California, he planned to grow bamboo sprouts and other Chinese vegetables for sale to southern California's Asian community. Lin said he had been told by county officials that the land was zoned for farming and no permit was needed. But those officials confiscated his tractor and disc and charged him with federal civil and criminal ESA violations because his tractor allegedly disturbed the habitat of the endangered Tipton kangaroo rat. The criminal charge carries penalties of up to a year in jail and a $100,000 fine. Other farms in the San Jaoquin Valley have also been recently targeted by ESA enforcers. A nearby farmer who irrigates with waste water from the city of Bakersfield has been charged with twelve counts of disturbing endangered species habitat and faces a possible penalty of $300,000. A Bakersfield spokesman said, "We have to have somewhere to spread the water. This situation could have disastrous consequences for the city." The affected farmer was reportedly told

by U.S. FWS agents he could resume operations on the land if he would give the state 640 acres of his land and $300,000. In Fresno, California, Tule Vista Farms agreed to pay a $5,000 fine, give sixty acres and sell an additional 100 acres to U.S. FWS to settle a case involving plowing land believed to be habitat for the endangered blunt-nosed leopard lizard.

• In June 1991, about 250 Florida landowners received a letter from U.S. FWS about the Florida scrub jay. The recipients were warned that "any activity that destroys scrub occupied by scrub jays may violate the Act." Such a violation can result in up to a year in jail and fines of $25,000 (civil) or $50,000 (criminal) per incident. The letter goes on to state that "although this may appear to be a burden, there is a procedure to resolve this conflict." Then the letter mentions Habitat Conservation Plans (HCP's) or Section 7 "take" permits. HCP's are extremely expensive and Section 7 permits—applied only under federally funded projects—provide no recourse for the property owner desiring to clear scrub brush from a backyard. Although prohibited from any type of property modification or use, the property owner is still responsible for any property taxes.

• For a decade, Richard Schroeder of Gearhardt, Oregon worked to develop a resort and golf course, only to discover that the development site was occupied by the Oregon silver spot butterfly. Undeterred, Mr. Shroeder hired the world's leading expert on the butterfly to develop a habitat conservation plan that would allow the development to proceed. Despite Schroeder's earnest efforts, the costly and cumber-

some regulatory process and the discovery of additional butterflies in another area of the development forced even his most committed investors to back out, forcing the cancellation of the project. Ironically, development of the property would have been in the interest of the butterfly whose habitat requirements include a violet that only grows in cleared areas.

The legislative history of the ESA gives little indication that the Act would impose significant costs on landowners. Nevertheless, expanding the definition of "harm" to include habitat modification has foisted a costly burden on private landowners. *See generally* Robert E. Gordon, Jr. and James R. Streeter, *Endangered Species Cost Identifiable in Recovery Plans and Other Findings*, 331 Tech. J. Franklin Inst. 244 (1994). A recent study of 306 recovery plans covering 388 listed species reveals an alarmingly frequent rate of potential conflicts between species protection and common, beneficial land uses. According to that study, protection of one third of the listed species conflicts with normal activities such as outdoor recreation, agriculture and grazing. In addition, at least 236 recovery plans call for law enforcement actions by U.S. FWS *Id.*

Concern about the growing costs, conflict and ineffectiveness of relying completely on a regulatory and punitive approach to protecting endangered species led Congress to amend the ESA in 1982 to authorize "habitat conservation plans" (HCP's). The theory was that landowners and government would cooperatively develop plans to protect sufficient

habitat for listed species and allow other use to be made of the rest of the property. Despite strong pressure to make HCP's work, several problems with HCP's have become apparent during the last ten years. Using HCP's turned out to be so expensive and complex a process that only very large parties with great resources could participate. Despite statements by Secretary Babbitt that a recent change in policy means landowners who enter into HCP's will be given greater certainty, other provisions of the Act contradict these assurances. An HCP cannot shield a participant from further burdens if a species not provided for in the plan is later listed or if the plan is not "properly functioning," or if "extraordinary circumstances" occur, or if an environmental group brings suit to make the plan more onerous. *Id.*

Since HCP's have such a disappointing track record, ecosystem management has become the latest term used to hold out the promise that the Act can be administered in a more reasonable and less burdensome way. The argument goes that, by protecting ecosystems, large numbers of species will be protected and the need to list them as endangered avoided. Critics point out, however, that an ecosystem protection approach provides no safeguards or discernible limits on federal authority. The term "ecosystem" is used to describe an interacting collection of organisms and their environment. There is no definitive pattern of ecosystems on the landscape awaiting discovery through the application of science. There is, instead, a limitless number of ecosystems with legitimate, different ways of mapping them. A puddle

can be delineated as the ecosystem of a freshwater flea, while an entire watershed—or more—could be seen as the ecosystem of a different species. As a consequence, a given tract of land could appear on scores of different maps and be criss-crossed by diverse ecosystem boundaries. Dr. Allan Fitzsimmon, a former top federal land use expert at the National Park Service, has warned, "Ecosystem planning could expose landowners and users to a Pandora's box of unpredictable and capricious restrictions." *Id.*

II. THE REGULATORY DEFINITION OF "HARM" MUST BE CONSTRUED IN A MANNER CONSISTENT WITH THE FIFTH AMENDMENT MANDATE THAT THE OWNER OF PRIVATE PROPERTY TAKEN FOR PUBLIC USE BE COMPENSATED.

According to Secretary of the Interior Bruce Babbitt, "The Endangered Species Act is an extraordinary piece of legislation because it allows the Federal Government to preserve, maintain, and foster the recovery of endangered species wherever they occur, without regard to geography, location, or land ownership." *National Biological Survey: Hearings before the Joint House Comm.*, 103rd Cong., 2d Sess. (1993). Due in large part to the broad definition of "harm" as including modification of a species' habitat, coupled with the severe civil and criminal sanctions for any violations of the Act, many reasonable and productive uses of

private property are being substantially curtailed or terminated altogether by the Act. For example, in order to avoid habitat modification which could "harm" a species protected under the Act, landowners have been prohibited from crossing dry creeks in vehicles, cutting trees, clearing brush, using pesticides, planting crops, building homes, grazing livestock, and protecting livestock from predators. In that way, the Act has in many instances deprived landowners of the only economic uses they can make of their properties — uses which are productive and which contribute to local, regional, and national economies and welfare.

Such cavalier destruction of property rights is in clear derogation of the constitutional mandate that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Indeed, it is doubtful that the regulatory excesses currently occurring under the ESA would be possible if the government were in fact complying with its constitutional duty to pay for the private property that it takes.

The right to use land is protected by the Fifth Amendment's due process and takings clauses. This Court has explicitly held that the property rights protected by the Fifth Amendment to the Constitution include the rights "to possess, use and dispose" of private property. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Ranching, farming and building fences and houses are common and historic uses of private property

which cannot be infringed or destroyed by government with impunity. "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition..." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992). *See also Dolan v. City of Tigard*, 112 S. Ct. 2309 (1994). Yet the agency definition of "harm" at issue in this case often allows the government to do just that by depriving individuals of the right to make normal and common uses of their land, without just compensation.

This Court has left no doubt that regulatory schemes, no matter how laudable, which result in the taking of private property must be compensated. As Justice Oliver Wendell Holmes warned back in 1922: "[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

Finally, the notion that the federal government is not in any manner restrained by the Fifth Amendment, and that property owners must sue for compensation for their loss after the fact, rings hollow in this era when the federal government in its zeal to do good, has engaged in the wholesale destruction of property rights. At some point, the Fifth Amendment must mean that government should take into account the property rights of its citizens before it destroys their lives and livelihoods. Requiring private individuals who have been singled out to bear the brunt of federal regula-

tion to then turn around and litigate against the might of the federal government in order to activate their constitutional guarantee — which takes years, indeed decades and hundreds of thousands of dollars to purse — simply does not satisfy the framers' clear intent that property rights be vigorously protected. As Justice William Brennan asked in his dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661, n.26 (1981). "After all, if a policeman must know the Constitution, then why not a planner?" Why then not the U.S. FWS?

CONCLUSION

Judge Jay Plager of the United States Court of Federal Claims recently stated: "Courts should leave no doubt as to whose side the law stands upon. . ." Hendler v. United States, 952 F.2d 1364, 1375 (Fed. Cir. 1991) By upholding the decision of the court below, this Court can make it clear that it stands behind the constitutional duty of government to protect private property rights.

For all of the foregoing reasons, we urge this Court to uphold the decision below.

Respectfully submitted,

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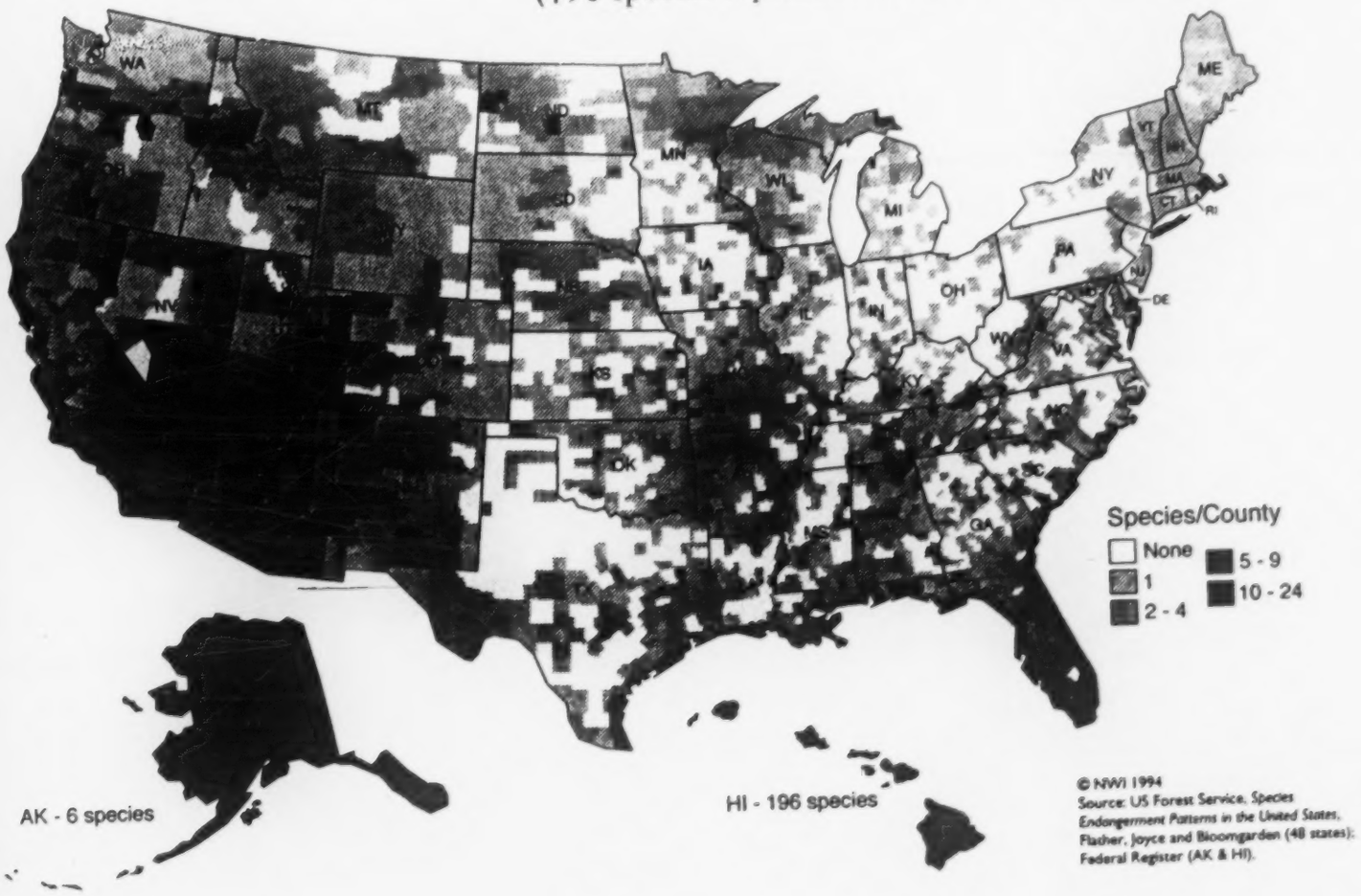
County by County Ranges of Endangered and Threatened Species

(790 species represented)



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Source: US Forest Service, *Species Endangerment Patterns in the United States*, Flather, Joyce and Bloomgarden (48 states); Federal Register (AK & HI).